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ARIZONA SUPREME COURT

In the matter of:)	Supreme Court No. R-
)	
PETITION TO AMEND RULES 2, 8, 13,)	(expedited consideration
32, 33, 34, AND 53, RULES OF)	and emergency adoption
PROBATE PROCEDURE)	requested)
_____)	

Pursuant to Rule 28 of the Rules of the Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts, respectfully petitions this Court to amend the rules specified above as proposed in the Appendix. The proposed amendments to the probate rules implement a legislative enactment from the 2021 legislative session as more particularly described below.

I. Purpose of the Proposed Rule Amendments. (Laws 2021, Ch. 248)

The Governor recently signed Senate Bill 1390, which will go into effect on the general effective date. This bill added provisions to Title 14, authorizing a court in a probate matter to appoint a guardian ad litem (“GAL”) as a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated person, unborn or unascertained person, or person whose identity or location is unknown. It allows a court to appoint a single representative

for several persons or interests. A GAL may act on behalf of the person represented with respect to any matter related to trusts, estates, or protective proceedings, whether or not a judicial proceeding concerning the trust or estate is pending. A GAL may consider the general benefit accruing to the living members of the family of the person represented. The bill also provides for reasonable compensation to be paid by the estate of the ward; the petitioner if the petition is withdrawn, dismissed, or denied; or, if there are insufficient funds available, the county.

This petition proposes amendments to Rules 2, 8, 13, 32, 33, 34, and 53 of the Arizona Rules of Probate Procedure to provide a GAL with the authority and responsibility addressed in these rules that is authorized by the new legislation.

II. Rule 2 (Definitions)

The proposed amendment to Rule 2 adds “guardian ad litem” to the list of defined words and phrases. Just as the phrase “statutory representative” does in the current rule, it refers the reader to Rule 32.

III. Rule 8 (Confidential Documents and Information)

The proposed amendment to Rule 8(b)(2) adds “guardian ad litem” to the list of persons entitled to access to confidential documents and information in the probate proceeding in which the GAL was appointed. The amendment also removes “statutory representative” because the legislation clarified that a statutory representative can only be appointed in a trust proceeding where a Probate Information Form is not filed.

IV. Rule 13 (Probate Information Form and Notice of Change of Contact Information Form)

The proposed amendment to Rule 13 requires a person who files a Notice of Change of Contact Information Form to mail or deliver a copy to the subject person's GAL.

V. Rule 32 (Statutory Representative)

The proposed amendment changes the heading to "Guardians ad Litem and Statutory Representatives." It defines the terms "guardian ad litem" and "statutory representative," and explains when and how they can be appointed. Notice of hearings on petitions to appoint a GAL must be provided to all interested persons, as required by law. The proposed amendment lists requirements for orders that appoint a GAL and authorizes the court to give a GAL immediate access to the subject person's medical and financial records. It clarifies that a GAL is a party to the probate case in which the GAL was appointed, with the same rights and responsibilities of any other party.

The proposed amendment includes a comment in place of the current comment to the 2020 amendments. The proposed comment explains the legislative history related to the terms "guardian ad litem" and "statutory representative," clarifies that a GAL can be appointed in all proceedings brought under Title 14 and a statutory representative can be appointed only in trust proceedings, and addresses other differences between the powers associated with the two types of appointment.

VI. Rule 33 (Compensation for Fiduciaries, Attorneys, and Statutory Representatives)

The proposed amendment changes the heading to add GALs to the list of those whose compensation may be paid from an estate of a ward or protected person, or a trust that the ward or protected person established. In each of the rule's subsections addressing fee requests, GAL is added as a person who can seek fees, and who waives compensation if a timely fee petition is not filed.

VII. Rule 34 (Prudent Management of Costs)

The proposed amendment adds GALs to the list of persons and parties who must notify the court and other parties when there is a reasonable belief that the projected cost of complying with a court order may exceed the likely benefit to the ward, protected person, decedent's estate, or trust. It also adds GAL to the subsection that requires the court and the fiduciary to pay no more than market rates for a good or service.

VIII. Rule 53 (Settlement of Claims for Minors and Adults in Need of Protection)

The proposed rule replaces "statutory representative" with "GAL" as a person who may be appointed to represent the interests of a minor or adult in need of protection in an action to approve the settlement of a claim brought on the subject person's behalf.

IX. Preliminary Comments

This petition has not been sent to the court community for pre-filing comments because of its technical nature and due to the short period of time since the enactment of the new statutory provisions. However, petitioner received substantial assistance from Jay Polk, the Presiding Probate and Mental Health Judge in Maricopa County, who drafted the proposed rule amendments. The draft was also shared with the Honorable Rebecca Berch, who chaired the Probate Rules Task Force, and attorney TJ Ryan, a member of that group. Their comments were considered.

VII. Request for Emergency Adoption.

The legislation identified in this petition will become effective on the general effective date, which is expected to be in September. Therefore, petitioner requests expedited consideration and emergency adoption of all proposed rules at the Court's August Rules Agenda, with a formal comment period to follow, as permitted by Supreme Court Rule 28(h).

Respectfully submitted this ____ day of June, 2021.

By: _____
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APPENDIX

Rule 2. Definitions

- (a) “A.C.J.A.” is the Arizona Code of Judicial Administration.
- (b) “Application” has the meaning described in Rule 14.
- (c) “A.R.S.” is the Arizona Revised Statutes.
- (d) “Attend” means to be present, either personally or by counsel, at a court event.
- (e) “Civil Rules” means the Arizona Rules of Civil Procedure. A “Civil Rule” is a rule in the Arizona Rules of Civil Procedure.
- (f) “Court” includes a superior court judicial officer, clerk, or court administrator.
- (g) “Court day” is a day that is not a Saturday, Sunday, or legal holiday.
- (h) “Demand for notice” means a written request filed with the court by an interested person to be notified of any filings in the probate proceeding.
- (i) “Evidence” means testimony, documents, objects, or other things offered to prove the existence or nonexistence of a fact.
- (j) “Financial institution” is defined in A.R.S. § 14-5651.
- (k) “Guardian ad litem” is defined in Rule 32.
- (~~kl~~) “Incapacitated person” is defined in A.R.S. § 14-5101.
- (~~lm~~) “Interested person” is defined by A.R.S. § 14-1201 and includes a party.
- (~~mn~~) “Judicial officer” includes a superior court judge, commissioner, or judge pro tempore.
- (~~no~~) “Licensed fiduciary” means a person or entity licensed by the Arizona Supreme Court under A.R.S. § 14-5651.
- (~~op~~) “Medical professional” means a physician, psychologist, and registered nurse for guardianship and conservatorship proceedings under A.R.S. §§ 14-5303(C) and 14-5407(B), and a psychiatrist or psychologist in a proceeding requesting inpatient treatment authority under A.R.S. § 14-5312.01.
- (~~pq~~) “Motion” is defined in Rule 19.
- (~~qr~~) “Oral argument” is defined in Rule 19.
- (~~rs~~) “Party” is a person who has filed a notice of appearance, an application, a petition, a response, or a joinder in a probate proceeding. An interested person who has filed a demand for notice or a statement of no position—but who has not filed a notice of appearance, a petition, response, or a joinder—is not a party.
- (~~st~~) “Petition” is described in Rule 15.
- (~~tu~~) “Pleading” means an application, a petition, or a response to a petition.
- (~~uv~~) “Protected person” is defined in A.R.S. § 14-5101.
- (~~vw~~) “Protective proceeding” is defined in A.R.S. § 14-5101.
- (~~wx~~) “Statutory representative” is defined in Rule 32.

(~~xy~~) **“Subject person”** is the decedent, alleged incapacitated person, ward, person allegedly in need of protection, or protected person, whose estate or interest is the focus of the proceeding.

(~~yz~~) **“Ward”** is defined in A.R.S. § 14-5101.

Rule 8 Confidential Documents and Information

(a) [no changes]

(b) Access to Confidential Documents.

(1) *Generally.* Confidential documents are not part of the public record of a probate case.

(2) *Probate Information Form.* Only the following persons may access the Rule 13 Probate Information Form:

(A) an attorney or a ~~statutory representative~~ guardian ad litem appointed by the court to represent the subject person of a guardianship or protective proceeding in which the document has been filed;

(B) a court investigator appointed for the probate case in which the Probate Information Form has been filed;

(C) judicial officers, court administrative staff, and other court personnel whose official duties require access to confidential information for processing and managing probate cases;

(D) the public fiduciary;

(E) staff from the Administrative Office of the Courts who are conducting a compliance audit of a fiduciary, or an investigation into alleged misconduct by a licensed fiduciary, under Arizona Code of Judicial Administration § 7-201; and

(F) any person authorized by the court, on a showing of good cause, to view or obtain a copy of the confidential document;

(3) [no changes]

(c) through (g) [no changes]

Rule 13. Probate Information Form and Notice of Change of Contact Information Form

(a) Definitions. For purposes of this rule,

- (1) “*Contact information*” means the information designated on the Probate Information Form as contact information; and
- (2) “*Fiduciary*” means a personal representative, guardian, or conservator, whether temporary or permanent.

(b) Probate Information Form.

- (1) *Generally.* A party who requests the appointment of a personal representative must file Form 11, Probate Information Form. A party who requests the appointment of a guardian or conservator, whether temporary or permanent, must file Form 12, Probate Information Form.
- (2) *Confidentiality.* The court must maintain a Probate Information Form filed under this rule as a confidential document under Rule 8.
- (3) *No Service.* Except as required by the court, a party who files a Probate Information Form is not required to provide other parties or interested persons with a copy of the form.
- (4) *Non-Compliance.* The clerk may not reject a petition or application because the filing party failed to provide all the information required in the Probate Information Form.
- (5) *Duty to Correct.* A party who has filed a Probate Information Form and who subsequently discovers that the date of birth or social security number contained in that Probate Information Form is incorrect must file an amended Probate Information Form with the correct information within 10 court days after discovery.

(c) Notice of Change of Contact Information.

- (1) *Generally.*
 - (A) *Change in Contact Information for Fiduciary.* If a fiduciary’s contact information changes during the fiduciary’s appointment in a probate

case, the fiduciary must file Form 13, Notice of Change of Contact Information Form, within 10 court days after such change occurs.

(B) *Change in Contact Information for Ward.* If a ward's contact information changes, the ward's guardian must file Form 14, Notice of Change of Contact Information Form, within 3 days of learning of such change.

- (2) *No Confidentiality.* Unless the court orders otherwise, a Notice of Change of Contact Information filed under this rule must be maintained as part of the public record.
- (3) *Service.* Unless the court orders otherwise, a person who files the Notice of Change of Contact Information Form must mail or deliver a copy to the subject person's court-appointed attorney, the subject person's statutory representative, guardian ad litem, and all parties to the probate case in which the form has been filed.
- (4) *Non-Compliance.* Absent good cause, the fiduciary must pay all costs of the court or the estate that result from a failure to timely provide a Notice of Change of Contact Information.

Rule 32. Guardians ad Litem and Statutory Representatives

(a) Definitions.

- (1) "Guardian ad litem" means a person appointed under A.R.S. § 14-1408.
- (2) "Statutory representative" means a person appointed under A.R.S. § 14-1408 14-10302 and includes the role traditionally described as a guardian ad litem.

(b) **Generally.** The court may appoint a guardian ad litem or statutory representative as authorized by A.R.S. § 14-1408 follows.

- (1) *Guardian ad litem.* In any proceeding brought under title 14, the court may appoint a guardian ad litem as authorized by A.R.S. § 14-1408.
- (2) *Statutory representative.* In a trust proceeding brought under chapter 11 of title 14, the court may appoint a statutory representative for a trust

beneficiary as authorized by A.R.S. § 14-10302. The court's authority to appoint a statutory representative in a trust proceeding is in addition to its authority to appoint a guardian ad litem.

(c) How Requested. If a party requests the appointment of a guardian ad litem or a statutory representative, the party must file a verified petition that states with specificity the following:

- (1) whether the person for whom the guardian ad litem or the statutory representative is requested is a minor, an incapacitated person, an unborn child or unascertained person, or a person whose identity or location is unknown; and
- (2) why that person's interest is not represented ~~under A.R.S. §§ 14-1404 through 14-1407,~~ or why otherwise available representation is inadequate.

(d) Notice of Hearing. The petitioner must give notice of the hearing to all interested persons as set forth in A.R.S. § 14-1401. In addition:

- (1) *Minor.* If the petitioner requests appointment of a guardian ad litem or a statutory representative for a minor, the petitioner must give notice as set forth in A.R.S. § 14-5207(A).
- (2) *Incapacitated Person.* If the petitioner requests appointment of a guardian ad litem or a statutory representative for an alleged incapacitated person, the petitioner must give notice as set forth in A.R.S. § 14-5309.
- (3) *Person Whose Identity or Location is Unknown.* If the petitioner requests appointment of a guardian ad litem or a statutory representative for a person whose identity or location is unknown, the petitioner must give notice as set forth in A.R.S. § 14-1401(A)(3).

(e) Appointment of Guardian ad Litem ~~Statutory Representative~~ for Subject Person of Adult Guardianship or Protective Proceeding. The court must not appoint a guardian ad litem ~~statutory representative~~ for the subject person of an adult guardianship or protective proceeding unless the court, after notice and hearing, has found that the subject person is an incapacitated person as defined in A.R.S. § 14-5101 or is a person in need of protection under § 14-5401(A)(2).

(f) Order.

- (1) *Required Provisions.* An order appointing a guardian ad litem or a statutory representative must state:
 - (A) the basis for the appointment;
 - (B) the appointment's scope and duration;
 - (C) that the guardian ad litem or the statutory representative represents the person's interest, not the person whether the representative will represent the person or the best interests of the person; and
 - (D) any applicable terms of compensation.
- (2) *Additional Provisions.* An order appointing a guardian ad litem or a statutory representative may grant immediate access to the person for whom the guardian ad litem or the statutory representative has been appointed and to medical and financial records pertaining to such person, including records and information that are otherwise privileged or confidential.

- (g) Participation in Court Proceedings.** A guardian ad litem and a statutory representative ~~is a party~~ are parties to the probate case in which they are ~~statutory representative was appointed and has~~ have the same rights and responsibilities of any other party.

COMMENT TO THE 2020 AMENDMENTS

~~The position formerly known as “guardian ad litem” was replaced in probate proceedings by that of a statutory “representative.” See A.R.S. § 14-1408(A) (eff. 2009); Unif. Trust Code § 305 cmt. The official Comment to Uniform Trust Code section 305, from which A.R.S. § 14-1408 is derived, explains that the powers of a representative may be broader than the powers of a guardian ad litem.~~

COMMENT TO THE 2021 AMENDMENT

When Arizona adopted the Uniform Trust Code in 2009, the position formerly known as “guardian ad litem” was replaced by that of statutory “representative.” See A.R.S. § 14-1408(A) (2009); Unif. Trust Code § 305 cmt. Thus, the 2020 Amendments to the Probate Rules likewise replaced “guardian ad litem” with “statutory representative.” Laws 2021 Chapter 248 (SB1390) restored the position of “guardian ad litem” to all proceedings brought under Title 14 and limited the

position of “representative” to only trust proceedings. Compare A.R.S. § 14-1408 with A.R.S. § 14-10302. The official Comment to Uniform Trust Code section 305, from which A.R.S. § 14-1408 is derived, explains that the powers of a representative may be broader than the powers of a guardian ad litem. For example, while the duration of a guardian ad litem’s appointment can be no longer than the case in which the guardian ad litem was appointed, the duration of a statutory representative’s appointment can extend beyond the case in which the statutory representative is appointed.

Rule 33. Compensation for Fiduciaries, Attorneys, Guardians ad Litem, and Statutory Representatives

(a) Generally.

- (1) *Guardianships and Conservatorships.* A request for approval of fees for a guardian, a conservator, an attorney, a guardian ad litem, or a statutory representative to be paid from an estate of a ward or protected person, or a trust that the ward or protected person established, must be made in a petition filed under section (c) or section (d) of this rule.
- (2) *Decedents’ Estates and Trusts.* A personal representative, a trustee, a guardian ad litem, a statutory representative, or an attorney for any of them, is not required to request court approval of fees to be paid from the estate or trust, unless the court orders otherwise. If approval is requested, the request must be made in a petition filed under section (c) or section (d).

(b) [no changes]

(c) Approval in an Account. If a petition requests approval of a fiduciary's account and the account lists fees paid to a fiduciary, an attorney, a guardian ad litem, or a statutory representative, the petition must request the court’s approval of those fees paid during the accounting period. Statements that document the fees paid and conform with section (b) must be submitted with the petition.

(d) Approval by Separate Petition. If a request for approval of fees is not included in a petition for approval of the fiduciary’s account, a fiduciary, an attorney, a guardian ad litem, or a statutory representative may file a separate petition for approval of compensation.

(e) **Waiver.** An attorney, a guardian ad litem, or a statutory representative waives compensation from the estate of a ward or protected person if a request is not timely submitted under A.R.S. §14-5110.

(f) and (g) [no changes]

Rule 34. Prudent Management of Costs

The following are in addition to the duties imposed by A.R.S. § 14-1104 and A.C.J.A. § 3-303.

(a) **Disclosure When Cost Exceeds Benefits.** A guardian ad litem, statutory representative, guardian, conservator, personal representative, attorney for a fiduciary, or an attorney for a ward or protected person must timely disclose to the court and the other parties any reasonable belief that the projected cost of complying with a court order may exceed the likely benefit to the ward, protected person, decedent's estate, or trust.

(b) **Orders.** If appropriate and if consistent with due process, the court may enter or modify orders to protect or further the best interests of the ward, protected person, decedent's estate, or trust.

(c) **Market Rates.** In appointing a fiduciary, attorney, guardian ad litem, or statutory representative, in ruling on or considering a budget objection, and in ruling on a request to substitute a court-appointed fiduciary, attorney, guardian ad litem, or statutory representative, the court and the fiduciary should not pay more than market rates for a good or service.

(d) **Competitive Bids.** At any stage of the proceedings, the court may require competitive bids for goods or services.

Rule 53. Settlements of Claims for Minors and Adults in Need of Protection

(a) and (b) [no changes]

(c) **Appointment of a ~~Statutory Representative~~Guardian ad Litem or Master.**
The court may appoint a ~~statutory representative~~ guardian ad litem pursuant to

A.R.S. § 14-1408 or a master pursuant to Civil Rule 53, with instructions to address specific items, including any of the following:

- (1) the reasonableness of the settlement proposal,
- (2) the attorney fees to be paid from the minor's or adult's settlement proceeds,
- (3) the costs of litigation and apportionment of those costs,
- (4) the effect of the settlement on eligibility for public benefits or other resources which might be available, and
- (5) the proper apportionment of settlement proceeds among the various litigants.

(d) [no changes]